APPENDIX A

[Filed Aug, 16 2000]

UNITED STATES COURT OF APPEALS
For the Fourth Circuit

Civil Action No. 1237

GREGORY E. WEST,
Plaintiff-Appellant

v.

AT & T TECHNICAL SERVICES, INC.

Appeal from the United States District Court for the Eastern District of Virginia No. 99-742-A

PLAINTIFF'APPELLANT'S PETITION FOR REHEARING EN BANC

INTRODUCTION

Plaintiff petitions the court for a rehearing En Banc under Rule 35 of the Federal Rules of Appellate Procedure because in counsel's judgment, one or more of the situations exist as described in Rule 40, namely, material facts were overlooked in the decision; a change in the law occurred after the case was submitted, which was overlooked by the panel, and the courts' decisions are in sharp conflict with the decision of the U. S. Supreme Court, and other circuits.

I A CHANGE IN THE LAW OCCURRED AFTER THE CASE WAS SUBMITTED AND WHICH WAS OVERLOOKED BY THE PANEL

The U.S. Supreme court decision of *Reeves v. Sanderson Plumbing Products, Inc*, 530 U.S.—(2000) clearly impacts as a change in the law which occurred after the case was submitted and which was overlooked by the panel. The District court applied the incorrect legal standard in determining that the Defendant was entitled to summary judgment.

As pointed out by the Supreme Court in *Reeyes v. Sanderson Plumbing Products, Inc.*, 530 U.S.—2000, ". . .evidence suggesting that a defendant accused of illegal discrimination has chosen to give a false explanation for its actions gives rise to a rational inference that the defendant could be masking its actual, illegal motivation"

The District court found that Plaintiff had provided no evidence that Defendant's promotion of Ms. Wendy O'Toole was because of race or gender since *Ms. O'Toole was better qualified for the position than was the Plaintiff* due to *significantly more experience with switch database programs.* Here, the court disregarded Plaintiff's clear and convincing evidence, including affidavits from supervisors and co-workers, submitted in opposition to the Motion for Summary Judgment, which proved the employer's reasons to be false.

In Exhibit A, Ms. O'Toole's resume', it is reflected that she had four years experience as a Telephone Switch Data Base Manager and a Switch Interface Programmer, performing database management on the following telephone equipment: *25 DVC DBX Secure switches, 5 Intecom 5-80 Secure switches, 3 Intecom S-SO Commercial (nonsecure) switches, 1 Intecom Telari Secure Switch, 1 AT&T 5ESS Commercial Switch, 1 OCTEL Voice Messaging System, performing system level diagnostics on the above listed*

equipment to isolate malfunctions and assist in capacity planning. In Exhibit B, Ms. O'Toole's Declaration, signed October 29, 1999, Ms. O'Toole further contends that she possessed " over five and a half years" experience as a telephone switch data base administrator dealing with over 30 switches and multiple classification levels including both secure and non-secure switches". This evidence submitted by Defendant suggests that her experience as a switch data base administrator was acquired shortly after her departure from Marshall's Department Store. However, in AT&T's performance evaluation of Ms. O'Toole, dated and signed October 4, 1996, by her supervisor, Scott Rice, Exhibit C, also submitted in evidence by Defendant, it is reflected under "AREAS FOR IMPROVEMENT", that Ms. O'Toole required training in the "5E55 switch, the IBX switch, and the DVC switch". Furthermore, it was recommended that a "Proposed FY 97/98 training schedule" include training in (ESSS551X: *CBT INTRODUCTION TO THE 5ESS*, ES5O1O, ES5OSA, E5505B, E5505C, E5505D, E5505E, ES5561), (CBT-1O1: *IBX TECHNICAL ORIENTATION*, DBT-205: IBX *STATION DATABASE & PVC STATION DATABASE*, DBT-302)(6025). Exhibit C directly conflicts with the claims of switch database experience of Ms. O'Toole represented in Exhibits A arid B. Exhibit D is a memorandum from Scott Rice to Lydia Baker and Anna Howard, dated August 19, 1996 showing skill classifications and recommended training for the CTAP group. It not only shows that Mr. West was proposed for " journeyman" training as opposed to Ms. O'Toole's proposed "apprentice" training for the DVC switches, but also shows that Ms. O'Toole had no training in several areas, in particular, the Telari, DVC DBX secure, the IBX 5-80 secure & non-secure switches as alleged in her resume'. This is further supported in the affidavit of Lydia Baker, Ms O'Toole's previous supervisor, as follows: 8. . . "Gregory became the database person of the Assignment Bureau, and on March 1, 1995 he received a pay increase for

the promotion to the database position During this time, Wendy O'Toole did not perform any switch database work. Wendy O'Toole did not receive any training to do any switch database work." (Exhibit A to Plaintiff's Opposition to Motion for Summary Judgment). Clearly, Ms. O'Toole's resume' misrepresents her true qualifications and skills at the lime she replaced the Plaintiff in 1996. This defeats the Defendant's proffered reason for placing Ms. O'Toole in the position. The evidence presented by Plaintiff shows the falsity of Defendant's proffered claim that Ms. O'Toole . was better qualified than he was, and a jury would be entitled to reject Defendant's reason for replacing Plaintiff with Ms. O'Toole, and, would be entitled to infer the ultimate fact of intentional discrimination. As further held by the Supreme Court, "In appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose . . . . the fact finder is entitled to consider a party's dishonesty about a material fact as "affirmative evidence of guilt" Reeves, *Id.* citing *Wright v. West*, 505 U.S. 277, 296 (1992). Further, "Thus, a plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated". Herein lies a genuine issue of material fact that was overlooked by the court.

II. THE OPINION IS IN CONFLICT WITH A DECISION OF THE UNITED STATES SUPREME COURT OR OTHER CIRCUITS

Petitioner respectfully submits that both the District Court's decision and the decision of the Panel are in direct conflict with the Supreme Court's decision in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S.—(2000) as well other Circuit court decisions.

"Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge." *Reeves v. Sanderson Plumbing Products, Inc., 530* U.S.—(2000) citing *Anderson v. Liberty Lobby. Inc.*, 477 U.S. 246 (1986)

In granting the defendant's Motion for Summary Judgment on December 16, 2000, the District court found that Plaintiff had not shown the existence of material facts in dispute. In so finding, the court overlooked Twelve (12) genuine issues of material fact which were supported by seven (7) sworn affidavits, addressing both the issue of his qualifications versus those of Ms. O'Toole, and the issue of retaliation. In holding that Plaintiffs facts do not provide any "evidence" to the court that AT&T's promotion of Ms. Wendy O'Toole was because of her race or gender, the Court applied an evidentiary standard which is the exclusive province of a jury. Whether the issues raised by the Plaintiff are "evidentiary", are issues of fact for the jury to decide , not the court. The Supreme Court holds that ". . .*the standard for judgment as a matter of law under Rule 50 mirrors the standard for summary judgment under Rule 56 . . . . Thus, the court must review all of the evidence in the record . . . . drawing all reasonable inferences in favor of the non-moving party, but making no credibility determinations or weighing any evidence . . . . The latter functions, along with the thawing of legitimate inferences from the facts, are for the jury, not the court . . . . Thus, although the court should review the record as a whole, it must disregard all evidence favorable to the moving party that the jury is not required to believe*" *Id.* at 14-16

/s/ Gregory E. West
GREGORY E. WEST

CERTIFICATE OF SERVICE

I, Gregory E. West, Plaintiff-Appellant, Pro Se, certify that two (2) copies of this Petition for Rehearing En Banc have been mailed to the party shown below:

RONDA L. BROWN
MCGUIRE, WOODS, BATTLE
& BOOTHE LLP
1750 Tysons Boulevard
Suite 1800, Tysons Corner
McLean, Virginia 22102

This 16th Day of August, 2000

/s/ Gregory E. West
GREGORY E. WEST

Wendy E. O'Toole
8741 Susquehanna St.
Home Phone: 703-690-4698
Work Phone: 703-874-1331

OBJECTIVE To obtain a position in the computer field enabling me to grow and expand on my related telecommunications experience.

Summary of Qualifications

Four years experience as a Telephone Switch Database manager dealing with over thirty systems and multiple classification levels. Over nine years experience in customer interaction, including the handling of sensitive information and determining user and system requirements. I currently hold a TS/SCI ISSA security clearance with polygraph.

EXPERIENCE

Switch interface Programmer AT&T Technical Services
February 1994-Present

Perform database management on the following telephone equipment:

- 25 DVC DBX Secure switches
- 5 Intecom S-80 Secure switches
- 3 Intecom S-80 Commercial(non-secure) swithes
- 1 Intecom Telari Secure Switch
- 1 AT&T 5ESS Commercial Switch
- 1 OCTEL Voice Messaging System

- Perform system level diagnostics on above equipment to isolate malfunctions and assist in capacity planning.
- Interact with customers to determine planning and user requirements, also interface with customer in a help desk capacity.

- Coordinate with project officers and technicians to add new services and database changes.

Customer Service Representative AT&T Technical Services February 1994-August 1996

- Served as point of contact for project officers and customer.
- Determined customer requirements for writing and processing work orders and job requests.
- Duties included creating, researching and maintaining database.

Customer Service Desk Assistant/Cashier, Marshall's Department Store August 1993-February 1994

- Coordinated displays.
- Assisted with layaway plans and handling of money.

Independent Contractor Central Intelligence Agency August 1989-November 1983

- Escorted applicants through secure facility.
- Reviewed and maintained applicants personal history files.

OTHER SOFTWARE EXPERIENCE

- Lotus Notes Fox Pro SRS Trouble Reporting System
- MS Word MS Excel MS PowerPoint
- Ms Access Internet DOS 5.0

EDUCATION

- AT&T 5ESS Certified Maintenance Course, AT&T
- DBX Telephone Switch Database Certification, Digital voice Corporation

- Bachelor's Degree Candidate-Business, George Mason University
- Business Major-Mount St. Mary's College

ACHIEVMENTS

- Co-founder of Mu Tau chapter of Delta Sigma Pi, a professional business fraternity.
- Have received three letters of commendation from AT&T Technical Services.

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF VIRGINIA
Alexandria Division

Civil Action No. 99-742A

GREGORY E. WEST.

Plaintiff,

v.

JOHNNIE MOORE, AND AT&T TECHNICAL SERVICES, INC.,

Defendants.

DECLARATION OF WENDY O'TOOLE

COMES NOW Wendy O'Toole who, under 28 U.S.C. § 1746, declares under penalty of perjury that the forgoing is true and correct:

1. I began working for AT&T Technical Services Company, Inc. ("AT&T") in February 1994 as a customer service representative on the Operations and Maintenance Network Information Systems ("OMINIS") contract, and I was assigned to work at the Central Intelligence Agency ("CIA"). I am currently employed by AT&T as a switch database administrator.

2. AT&T is a contractor with the United States Government.

3. I have over five and a half years of experience as a telephone switch database administrator dealing with over thirty switches and multiple classification levels including both secure and non-secure switched. In addition. I have a completed the AT&T 5SES Certified Maintenance Course and received the DBX Telephone Switch Database Certification. See resume attached as Exhibit 1.

4. On or around September 1996, Nicholas Vukson assigned me to the switch database administrator position, At that time, Joe Puglisi was being transferred to another position on the OMNIS contact.

5. Prior to being assigned to the switch database administrator position, I was Mr. Puglisi's "back-up" for approximately one year. During this time, my work station was in the same vicinity as Mr. Puglisi's work station, and I was responsible for assisting Mr. Puglisi was with the switch database administrator duties on a daily basis. In addition, when Mr Puglisi duties on a daily base. In addout of the office, I assumed full responsibility for the switch database administrator duties.

6. While acting as Mr. Puglisi's "back-up", I was able to gain significant experience with two new switch database systems that were implemented in the Centralized Telephone Assignment Process ("CTAP") group in early 1996.

7. During the time I served as Mr. Puglisi's "back-up" in the CTAP group, Gregory West was assigned to the Expedited Service Order Process ("WSOP") group, and he worked in a different tower of the building.

AND FURTHER THE DECLARANT SAYETH NOT.

_____ Wendy O'Toole

Date WENDY O'TOOLE

AT&T TECHNICAL SERVICES COMPANY
— PERFORMANCE APPRAISAL —

EMPLOYEE'S NAME Wendy O'Toole SOC. SEC. NO. 238-23-8863

START DATE OF CURRENT ASSIGNMENT 09/17/95 APPRAISAL DATE 10/01/95 PERIOD 9/30/96

PROGRAM OMNIS LOCATION OMNIS

MAJOR RESPONSIBILITIES (Listed at Beginning of Appraisal Period)

Generate telephone Service Orders based on customer requests. This process requires Project Manager and technician interface and follow up as well as data collection, querying and multiple database entries into telephone switching systems and supporting tools. Provide backup switch database support as needed. Work as directed by supervisor.

SUPERVISOR SIGNATURE

EMPLOYEE'S SIGNATURE

Ratings for each of the performance dimensions should be based on the performance standards applicable to that dimension. Refer to the instruction for determining the overall rating.

Cite any documentation added to employee's file (e.g., commendations, counseling, discipline, etc.) Supervisors may list additional information under "Performance Comments" and "Areas for Improvement." (Note - If experience with individual is insufficient to appraise, indicate "Not Assessed" in Performance Comments).

RATING DIMENSIONS

1. CORE VALUES (Respect for others including diversity, highest standard of integrity, dedication to service excellence and teamwork).

Outstanding	Above Average	Average	Needs Improvement
☐	☐	☒	☐
Consistently produced superior results	Frequently exceeds requirements	Meets requirements	

Performance Comments
Wendy meets the requirement on core values although improvement can be made in area of teamwork.

EXHIBIT C

2. QUALITY OF WORK (Extent to which work produced meets quality requirements. Includes accuracy, thoroughness and efficient use of resources).

Outstanding	Above Average	Average	Needs Improvement
☐	☒	☐	☐

Performance Comments
Wendy maintains above average ratings on the quality of her work and her use of resources.

3. QUANTITY OF WORK (Volume of work regularly produced speed and consistency of output).

Outstanding	Above Average	Average	Needs Improvement
☐	☐	☐	☒

Performance Comments
Wendy has been consistent in her output although it's normally lower than expected.

4. DEPENDABILITY (Regular and punctual attendance. Follows through and completes assignments).

Outstanding	Above Average	Average	Needs Improvement
☐	☐	☒	☐

Performance Comments
Wendy meets the requirement ratings on dependability. She follows through and completes her assignments but needs to improve in her punctual attendance and follow established procedures when calling in.

5. INITIATIVE (Performs well on own initiative with little or no supervision, demonstrates an innovative approach)

Outstanding	Above Average	Average	Needs Improvement
☐	☐	☒	☐

Performance Comments
Wendy meets the requirement.

AREAS FOR IMPROVEMENT (Must be completed for rating areas that are graded as "Needs Improvement")

Area	Action Recommended
Quantity of Work	The output volume of Service Orders has been consistently low without justification. Primary responsibility will now be station database and not Service Order generation.
Personal calls	Limit the number of personal calls, it appears to be affecting performance.
TRAINING (5ESS) (IBX) (DVC)	Proposed FY 97/98 training schedule (EBS651X,EBS010,EBS06A,EBS06B,EBS06C, EBS06D,EBS06E,EBS661)(CBT-101, DBT-205,DBT-302)(8025)

Determination of Overall Performance Rating

The Overall Rating is derived from the five dimension ratings. Each heading, below, shows the average of the five scores of dimension ratings that would result in that Overall Rating.

Outstanding Rating
Avg. of 2.6 - 3.0

Ex. O O O AA AA
3 + 3 + 3 + 2 + 2 = 13
13 divided by 5 = 2.6

Above Average Rating
Avg. of 1.8 - 2.5

Ex. O O O AA A
3 + 3 + 3 + 2 + 1 = 12
12 divided by 5 = 2.4

Average Rating
Avg. of 1.7 - ↓

Ex. O AA A A A
3 + 2 + 1 + 1 + 1 = 8
8 divided by 5 = 1.6
*Can not have 2 NI's and be rated average.

Needs Improvement Rating
Any combination with two or more NI's (0's)

Ex. O + A + NI + A + NI
3 + 1 + NI + 1 + NI
2 NI's = Needs Improvement Rating

Overall Rating Δ

Evaluator/Reviewer (Immediate Supervisor)

Scott C. Rice — Name Printed or Typed

Signature — Date 10/4/96

Approved by (Officer of the company)

Name Printed or Typed

Signature — Date

I have had the opportunity to review this document and discuss its contents with my supervisor. My signature acknowledges that I have been informed of my Overall Rating, but does not necessarily indicate agreement with my Overall Performance Rating.

Employee's Signature — Date

UNCLASSIFIED

NOTE FOR: Lydia V. Baker Y
Anna Howard Y

FROM: Scott C. Rice Y

DATE: 08/19/96 02:33:45 PM

SUBJECT: Training

I'm trying to identify the training classes we need in order to better complete our jobs. I've attached a training chart showing everyone currently in the group and where I believe them to be in skill classification. Please review it and make any RED LINE changes you feel are needed. Also, if you look at the legend you'll see the numbers of employees which should fall into the apprentice, journeymen, and specialist levels. further below that, I've listed everyone again and made a stab at spreading out the training in an attempt to meet the legend. I allocated the training over two years and although the names can change, right now it's important that we get the budget items in. Again don't get hung up on names but concentrate on the classes and the volume of classes. I need this back by COB 8/20/96

	FY97/98 Proposed Training required for CTAP personnel										
EQUIP	DVC 1200	DVC 3000	Mitel 50	Mitel 200	Telsri	Meridia Legend	Dim 400	Dim 2000	SYS 75	75 XE	G2
Personnel											
Baker, Lydia	J	J	N	N	N	N	N	N	N	N	N
Brown, Lucy	A	A	N	N	N	N	N	N	N	N	N
Bryne, Cynthia	A	A	N	N	N	N	N	N	N	N	N
Crawford, Barbara	A	A	N	N	N	N	N	N	N	N	N
Howard, Anna	J	J	N	N	N	N	N	N	N	N	N
Kochentiel, Ed	N	N	N	N	N	N	N	N	N	N	N
McBride, Deloris	J	J	N	N	N	N	N	N	N	N	N
Medlin, Ed	N	N	N	N	N	N	N	N	N	N	N
O'Toole, Wendy	A	A	N	N	N	N	N	N	N	N	N
Puglisi, Joe	A	A	N	N	A	N	N	N	A	N	N
Rector, Lisa	A	A	N	N	N	N	N	N	N	N	N
Rice, Scott	N	N	N	N	N	N	N	N	N	N	N
Tinner, Tisha	A	A	N	N	N	N	N	N	N	N	N
West, Greg	J	J	N	N	N	N	N	N	N	N	N
FY97/98 Proposed Training required for CTAP personnel											
Baker, Lydia											
5E5010	Switch architecture										
5E506A	Switch Translations: essentials for recent change										
5E505B	Switch Translations: recent change for business applications										
5E506C	Switch Translations: recent change for ISDN										
5E505D	Switch Translations: recent change for routing, charging, and digit analysis										
5E506E	Switch Translations: recent change for trunks										
	DVC Station Database										
359	Introduction to ISDN (learning tree)										
Brown, Lucy											
5E5551X	*CBT Introduction to the 5ESS										
CBT-101	*IBX Technical Orientation										
DBT-205	IBX Station Database										
	DVC Station Database										
Bryne, Cynthia											
5E5551X	*CBT Introduction to the 5ESS										
CBT-101	*IBX Technical Orientation										
DBT-205	IBX Station Database										
	DVC Station Database										
OCTEL	n/a	System operation and management									
OCTEL	n/a	Sierra Installation and Maintenance									
OCTEL	1104	Decision Pro Report Writing (p/n 001-75227)									
Crawford, Barbara											
5E5551X	*CBT Introduction to the 5ESS										
CBT-101	*IBX Technical Orientation										
DBT-205	IBX Station Database										
	DVC Station Database										

APPENDIX B

UNPUBLISHED

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 00-1237

GREGORY E. WEST,
Plaintiff-Appellant,

v.

AMERICAN TELEPHONE & TELEGRAPH TECHNICAL SERVICES, INCORPORATED,
Defendant-Appellee,

and

JOHNNIE MOORE,
Defendant.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Claude N. Hilton, Chief District Judge. (CA-99-742)

Submitted: July 27, 2000 Decided: August 2, 2000

Before MURNAGHAN, WILKINS, and KING, Circuit Judges.

Affirmed by unpublished per curiam opinion.

Gregory E. West, Appellant Pro Se. Ronda Lynn Brown, MCGUIRE, WOODS, BATTLE & BOOTHE, L.L.P., McLean, Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit. *See* Local Rule 36(c). .

PER CURIAM:

Gregory E. West appeals the district court's order granting the Defendant's motion for summary judgment in his civil action in which he alleged employment discrimination based upon race, gender, and retaliation. We have reviewed the record and the district court's opinion and find no reversible error. Accordingly, we affirm on the reasoning of the district court. *See West v. Moore*, No. CA-99-742 (E.D. Va. Dec. 16, 1999).* We dispense with oral argument because the facts and legal contentions are adequately 'presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

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* Although the district court's order is marked as "filed" on December 15, 1999, the district court's records show that it was entered on the docket sheet on December 16, 1999. Pursuant to Rules 58 and 79(a) of the Federal Rules of Civil Procedure, it is the date that the order was entered on the docket sheet that we take as the effective date of the district court's decision. *See Wilson v. Murray*, 806 F.2d 1232, 1234-35 (4th Cir. 1986)